Supreme Court of Massachusetts.

SANBORN v. ROYCE.

The seizure and actual removal of specific chattels of a partnership, on an execution against one member thereof for his private debt, and the exclusion of the firm from the possession of such property, constitute a trespass for which the firm may maintain an action against the officer.

ACTION of trespass for entering the plaintiffs' premises and taking and conveying away certain articles of personal property belonging to the plaintiffs. The defendant, a constable, justified on the ground that he attached said property upon a writ in favor of one Rich and another against Packard, one of the plaintiffs. The plaintiffs were copartners in business, and the defendant knew of the fact at the time of the attachment. The court below ruled that upon the facts the plaintiffs were entitled to nominal damages at least. The defendant excepted.

The opinion of the court was delivered by

ALLEN, J.—The question presented in this case has been several times alluded to, but has never been decided in Massachusetts, though it has been the subject of much discussion and conflicting opinion elsewhere. It has been declared that the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts, and a just settlement of the account between himself and his partner: *Peck* v. *Fisher*, 7 Cush. 389. This doctrine is in accordance with the great body of modern decisions.

It is also declared, in *Allen* v. *Wells*, 22 Pick. 452, that a separate creditor can take and sell only the interest of the debtor in the partnership property, being his share upon a division of the surplus, after discharging all demands upon the copartnership. This rule also is supported by a great weight of authority.

It is rather remarkable, in view of the multitude of cases in which the question has arisen, and the conflict of opinion which has existed, that the manner in which a creditor of one member of a firm may apply that member's interest in the partnership to the payment of his debt has not been more often the subject of legislation, The rights of parties, however, in this State, as in almost all the other States of the Union, are still left to be worked out as well as possible by the courts.

There is an entire concurrence of opinion among the leading text-writers, in recent times, that courts of law cannot adequately deal with the subject: 3 Kent Com. 65, n.; Story on Part., §§ 262, 312: Collyer on Part., § 830. Lindley sums up what he has to say with the remark: "The truth is that the whole of this branch of the law is in a most unsatisfactory condition, and requires to be put on an entirely new footing:" Lindley on Part. (4th ed.) 694.

It is sufficient for the purposes of the present case to decide, as we do, that the seizure and actual removal of specific chattels of a partnership, on a writ of execution against one member thereof for his private debt, and the exclusion of the firm from the possession of its property, are trespass. The authorities in support of this proposition seem to us more in accordance with just legal principles than those which are opposed to it: *Bank* v. *Carrolton Railroad*, 11 Wall. 628, 629; *Cropper* v. *Coburn*, 2 Curtis C. C. 465; *Burnell* v. *Hunt*, 5 Jur. 650, by PATTESON, J.; *Garvin* v. *Paul*, 47 N. H. 158; *Duborrow's Appeal*, 84 Penn. St. 404; *Haynes* v. *Knowles*, 36 Mich. 407; *Levy* v. *Cowan*, 27 La. An. 556.

Exceptions overruled.

Sir Nathaniel Lindley, in his valuable work on the Law of Partnership (p. *515), thus states the manner of issuing and levying an execution against a partnership for a firm debt: "If a judgment has been obtained against several persons sued jointly, the writ of execution founded on the judgment must be against all of them, and not against some or one of them only; for the judgment does not warrant such a writ. But, although the writ of execution on a joint judgment must be joint in form, it may be *levied* upon all or any one or more of the persons named in it; for each is liable to the judgment-creditor for the whole, and not for a proportionate part of the sum for which judgment is obtained. The consequence of this is that the sheriff may execute a writ issued against several partners jointly, either on their joint property, *or* on the separate property of any one or more of them, *or* both on their joint and on their respective separate properties: and so long as there is, within the sheriff's bailiwick, any property of the partners, or any of them, a return of *nulla bona* is improper. Of course, if the judgment-creditor has had execution and satisfaction against one of the partners, he cannot afterwards go against any of the others; but the important point to observe is, that the sheriff is not bound to levy on the goods of the firm before having recourse to the seperate properties of its members, and that they cannot require the sheriff to execute the writ in one way rather than another.

As to the mode in which an execution against one member of a firm for his individual debt should be levied, there is more difficulty. It may, of course, be levied upon his individual property in the same manner as if he were not a member of a firm. The difficulty arises when its collection is attempted from the interest of the execution debtor in the partnership property.

There can be no question but that the

nature of the share of a partner is correctly described in the principal case. "What is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the debts and liabilities have been paid and discharged:" Lindley on Partnership *661; *Matlock* v. *Matlock*, 5 Ind. 404; *Smith* v. *Evans*, 37 Id. 526; *Carter* v. *Bradley*, 58 Ill. 101; *Simpson* v. *Leach*, 86 Id. 286; *Hill* v. *Beach*, 12 N. J. Eq. 31; *Douglas* v. *Winslow*, 20 Me. 89; *Perry* v. *Holloway*, 6 La. Ann. 265; *Schalck* v. *Harmon*, 6 Minn. 265; *Filley* v. *Phelps*, 18 Conn. 294; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Stats* v. *Bristow*, 73 Id. 264; *In re Corbett*, 5 Saw. 206; *Hall* v. *Clagett*, 48 Md. 223; *Conkling* v. *Washington University*, 2 Md. Ch. 497.

The interest of one partner in the partnership property may be attached or levied upon and sold on execution for his separate debt: *Sitler* v. *Walker*, 1 Freem. Ch. (Miss.) 77; *Place* v. *Sweetzer*, 16 Ohio 142; *Nixon* v. *Nash*, 12 Ohio St. 647; *James* v. *Strattan*, 32 Ill. 203; *Newhall* v. *Buckingham*, 14 Id. 405; *White* v. *Jones*, 38 Id. 159; *Dow* v. *Sayward*, 14 N. H. 9; s. c. 12 Id. 271; *Marston* v. *Dewberry*, 21 La. Ann. 518; *Choppin* v. *Wilson*, 27 Id. 444; *Saunders* v. *Bartlett*, 12 Heisk. 316; *Wilson* v. *Strobach*, 59 Ala. 488; *Weaver* v. *Ashcroft*, 50 Tex. 428; *Peoples' Bank* v. *Shryock*, 48 Md. 427. But a creditor of an individual partner has a right to sell on execution only that partner's interest in the firm property, that is, what of the partnership property belongs to the debtor partner, after paying the debts due by the firm and his own debt to the firm: Lindley on Partnership *689; *Merrill* v. *Rinker*, 1 Bald. 528; *Lyndon* v. *Gorham*, 1 Gall. 367; *White* v. *Dougherty*, Mart. & Yerg. 309; *McCarty* v. *Emlen*, 2 Yeates 190; *Knox* v. *Summers*, 4 Id. 477; *Knox* v. *Schepler*, 2 Hill (S. C.) 595; *Tappan* v. *Blaisdell*, 5 N. H. 190; *Gibson* v. *Stevens*, 7 Id. 352; *Pierce* v. *Jackson*, 6 Mass. 242; *Fisk* v. *Herrick* 6 Id. 271; *Nixon* v. *Nash*, 12 Ohio St. 647; *Place* v. *Sweetzer*, 16 Ohio 142; *Brewster* v. *Hammet*, 4 Conn. 540; *Witter* v. *Richards*, 10 Id. 37; *Filley* v. *Phelps*, 18 Id. 294; *Jones* v. *Thompson*, 12 Cal. 191; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Williams* v. *Gage*, 49 Miss. 777; *Hacker* v. *Johnson*, 66 Me. 21. It is not, according to the better opinion, an interest in any particular piece of property that is liable for a partner's separate debts, but his interest in the firm assets after the settlement of the firm accounts. See *Atwood* v. *Meredith*, 37 Miss. 635, and the cases cited above. No specific asset, credit or property of the partnership is, according to the better opinion, liable to seizure under attachment execution or garnishee process against one of the partners: *Levy* v. *Cowan*, 27 La. Ann. 556; *Marston* v. *Dewberry*, 21 Id. 518; *Towne* v. *Leach*, 32 Vt. 747; *Peoples' Bank* v. *Shryock*, 48 Md. 427; *Lyndon* v. *Gorham*, 1 Gall. 367; *Bulfinch* v. *Winchenbach*, 3 Allen 161; *Sweet* v. *Read*, 12 R. I. 121; *Cook* v. *Arthur*, 11 Ired. 407; *Clagett* v. *Kilbourne*, 1 Black 346; *Gibson* v. *Stevens*, 7 N. H. 352; *Fisk* v. *Herrick*, 6 Mass. 271; *Atwood* v. *Meredith*, 37 Miss. 635; *Garvin* v. *Paul*, 47 N. H. 158. In Maine, however, it has been held that the debtor of a firm can be held as trustee of one of the partners in an action in which that partner is principal defendant, if neither a creditor of the firm nor any other partner interpose: *Thompson* v. *Lewis*, 34 Me. 167. It has also been held in that state that a creditor of one of the partners may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required in order to render the attachment regular to take the partner's interest in the entire stock of goods: *Fogg* v. *Lawry*, 68 Me. 78. See also *Carillon* v. *Thomas*, 6 Mo. App. 574. See, however, *Hacker* v. *Johnson*, 66 Me. 21.

If the sheriff sells and delivers not the share of the execution debtor, but the goods themselves, he is, according to some authorities, not liable in trover, but is accountable to the solvent partners for so much of the proceeds of the sale as is proportioned to their share in the partnership: Lind. on Part. *690; *Mayhew* v. *Herrick*, 7 C. B. 229; *White* v. *Woodward*, 8 B. Mon. 484. According to other authorities, however, and as it seems, according to the better opinion, a sheriff cannot, upon a demand against one partner for his private debt, seize the goods of the partnership and exclude the other partners from the possession; and if he does, he is guilty of a trespass and is liable in trover to another partner; and the plaintiff in such case, it is held, is entitled to recover his undivided share in the property sold, without regard to the state of the partnership accounts. See *Walsh* v. *Adams*, 3 Den. 125; *Spalding* v. *Black*, 22 Kans. 55; *Atkins* v. *Saxton*, 77 N. Y. 195. See, also, cases cited by the court in the principal case.

As to how an execution against one partner for his individual debt should be levied upon his share in the firm, Lindley, in his work on Part. *689, after stating the former practice, says that "it was finally settled, in conformity with the older cases, that the sheriff's duty was, and it still is, to seize the whole of the partnership effects, or if so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his copartners. The sheriff, having seized the property of the firm, proceeds to sell the interest of the judgment debtor, and to assign the same to the purchaser. The bill of sale recites that the sheriff has entered upon, and taken possession of, all the share and interest of A. B. (the judgment debtor) as partner with one C. D., of and in all the book debts, materials, tools, implements, goods, chattels, effects and stock in trade used in the said business, which has been valued at —*l.*; and the sheriff then assigns all the share, right and interest of him, the said A. B., of and in all and every the debts, chattels and effects so seized under and by virtue of the writ of *fi. fa.*, and held by the said A. B. in partnership or joint-tenancy with the said C. D., to have and to hold, receive and take, the said share, furniture, debts, goods, chattels and effects therebybargained and sold, or intended so to be, unto the said F. F. (the purchaser), his heirs, executors, administrators and assigns, as his and their own proper debts, goods and chattels." The purchaser at the sale under an execution against one partner of his interest in the partnership property, does not acquire any title to the property, entitling him to a delivery of it, nor if it be a debt entitling him to collect it. The title to the property or the debt still remains in the firm, and the purchaser acquires only a right to an account: Lind. on Part. *690; *Barrett* v. *McKenzie*, 24 Minn. 20; *Lathrop* v. *Wightman*, 41 Penn. St. 297; *Deal* v. *Bogue*, 20 Id. 228; *Reinheimer* v. *Hemingway*, 35 Id. 432; *Smith* v. *Emerson*, 43 Id. 456; *Wilson* v. *Strobach*, 59 Ala. 488; *Sitler* v. *Walker*, 1 Freem. Ch. (Miss.) 77; *Andrews* v. *Keith*, 34 Ala. 722. See, however, *Atkins* v. *Saxton*, 77 N. Y. 195, per RAPALJO, J. A suit in equity is, therefore, neeessary in order that the partnership accounts may be taken, and the partnership property duly applied; Lind. on Part. *690. The bill for an account may be filed after the seizure and before the sale, or the sale may be made and the purchaser left to file a bill to ascertain his interest: *Broadnax* v. *Thomason*, 1 La. Ann. 383: *Nixon* v. *Nash*, 12 Ohio St. 647. See also *Knight* v. *Ogden*, 2 Tenn. Ch. 473. The judgment debtor may, as it seems, elect to have the account taken before the sale by applying to a court of equity therefor: *Hacker* v. *Johnson*, 66 Me, 21, 25.

As to the decision in the principal

case, it will be apparent, we think, from an examinatian of the authorities cited by the court and those in this note, that it is correct both upon principle and authority.

M. D. EWELL.

Chicago.

Snpreme Court of Arkansas.

STATE *v.* GRIGSBY ET UX.

Parents are intrusted with the custody of their children on the presumption that the latter will be properly taken care of, and when it is found that the parents are guilty of gross neglect, cruelty or conduct injurious to the morals or interests of the children a court of chancery will interfere and appoint a suitable guardian.

This jurisdiction of the courts of chancery is not taken away by a like power conferred by statute on the probate courts.

The better practice is to bring the bill in the name of the infant by its next friend, but such bill ought not to be dismissed because brought in the name of the state.

APPEAL from Scott Circuit Court in Chancery.

This was a bill in equity in the name of the State against James Grigsby and Emma, his wife, alleging in substance that the defendant James, being the father of a child now about six years of age, intermarried with the defendant Emma: that defendants were able to properly provide for the child but that the defendant Emma, with the consent of the defendant James, subjected it to cruel and inhuman treatment, inflicting excessive chastisement, depriving it of food and drink, and in various ways, specifically set forth in the bill, torturing it to such an extent as to endanger its life; that several persons had offered to give it a comfortable home but that defendants refused to allow them to do so. The bill prayed that a guardian might be appointed, and that pending the suit defendants might be compelled to deliver the child to some suitable person. The court below appointed a custodian of the child and enjoined defendants from interference with his possession. At the next term defendant demurred to the bill on the grounds, 1st, of defect of parties: 2d, of want of jurisdiction, and, 3d, that the statements of the bill were not sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the bill. Plaintiff appealed.

Clendenning & Sandels, for the State.

The opinion of the court was delivered by

ENGLISH, C. J.—The jurisdiction of the court of chancery